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No. 84-312

IN THE

Supreme Court of the United States

October Term, 1984

DONALD J. DEVINE, Director
OFFICE OF PERSONNEL MANAGEMENT, *Petitioner,*

v.

NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MOTION FOR LEAVE TO FILE AND BRIEF OF THE UNITED BLACK FUND OF AMERICA, AMERICAN CANCER SOCIETY (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County Unit, and Northern Virginia Area Office), AMERICAN RED CROSS (District of Columbia Chapter), BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY, BOY SCOUTS OF AMERICA (National Capital Area Council), LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA, SALVATION ARMY (National Capital Area), VISITING NURSES ASSOCIATION OF NORTHERN VIRGINIA, CENTER CITY COMMUNITY CORPORATION and THE UNITED BLACK FUND OF GREATER WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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The above-named charitable and philanthropic organizations move for leave to file a brief *amici curiae* in support of the petition for a writ of certiorari in this action. If allowed to stand, the decision below will impede these and other similar charitable organizations in attaining their goals of providing health and welfare services directly to persons in need. These organizations support

the government's petition and, because of their unique perspective and the particular effect the decision below has on them, they seek to file the accompanying brief *amici curiae* in order to bring before the Court certain considerations which were not stressed by the government and which they believe will be important to the Court in deciding whether to grant the petition.

All of the above-named organizations, as more fully set out in the Appendix to the accompanying brief, are traditional eleemosynary organizations dedicated to providing direct health or welfare service to persons in need, and all are long-time participants in the Combined Fedeal Campaign. Since the decision below will serve only to diminish the effectiveness of the entire Campaign with the result that *amici,* their program beneficiaries, and ultimately society as a whole will suffer, these organizations urge this Court to grant their motion and consider their views.

Respectfully submitted,

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QUESTION PRESENTED

Whether Executive Order No. 12,404, which preserves the Combined Federal Campaign for its intended purpose of supporting traditional human health and welfare charity and thus excludes legal advocacy and certain other groups, violates the First Amendment.

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The United Black Fund of America, American Cancer Society (District of Columbia Division, Chesapeake-Potomac Area, Montgomery County Unit and Northern Virginia Area Office), American Red Cross (District of Columbia Chapter), Boys and Girls Homes of Montgomery County, Boy Scouts of America (National Capital Area Council), Lutheran Social Services of the National

Capital Area, Salvation Army (National Capital Area), Visiting Nurses Association of Northern Virginia, Center City Community Corporation, and the United Black Fund of Greater Washington submit this brief *amici curiae* to urge that the Court grant certiorari to resolve the important questions presented by this case relating to Executive Order 12,404 and to correct the D.C. Circuit's erroneous reading and application of this Court's "public forum doctrine." If left uncorrected, the decision below will have damaging and far-reaching effects on the important federal program at issue here, as well as countless other federal activities. Furthermore. the implications of the decision below will affect charitable fund raising in state and local government as well.

INTEREST OF AMICI

Amici represent a cross-section of humanitarian charitable organizations dedicated to providing health and welfare services directly to persons in need. They include national organizations, community chapters and divisions of national organizations, and strictly local organizations, and they provide human health and welfare services in a variety of ways including cancer research and patient services, disaster relief, in-home and day care for the elderly and infirm, youth development activities and food, shelter, and basic life necessities for the homeless.[1] While the precise focus of each *amicus* organization differs, they are nonpolitical, nonpartisan organizations dedicated to humanitarian service. Their purposes are recognized by citizens as community-wide concerns and there is a general consensus among federal employees and citizens that these organizations serve a necessary and desirable function.

[1] A description of each organization joining in this brief is submitted in the Appendix to this brief. While each *amicus* organization provides services in the Washington, D.C. metropolitan area, and some do so exclusively, these organizations have counterparts in communities nationwide.

In addition to being charitable organizations with the time-honored purpose of providing direct health and welfare services to persons in need, and thus fostering the well-being of the entire community, each *amicus* organization is a long-time participant in the Combined Federal Campaign ("Campaign"). These organizations, and particularly local organizations such as the United Black Fund and the Center City Community Corporation, obtain a substantial portion of their funding through the Campaign. *Amici* depend on the strength, viability and general acceptance of the Campaign among contributors. Because the decision of the court below is constitutionally unsound and poses a significant threat to the Campaign's well-being, they urge this Court to review that decision and set it aside.

Specifically, if left undisturbed, the impact of the decision below will be to diminish the effectiveness of the Campaign as a means of harnessing the generosity of federal employees to support charitable endeavors. The strength of the Campaign depends on the good will of employees and their willingness to donate to the participant organizations. The inclusion of wholly different kinds of agencies lacking the general acceptance accorded *amici*, such as right-to-work and other legal advocacy groups, necessarily weakens employee confidence in the Campaign, and, in fact, has already resulted in employee boycotts. The court-mandated transformation of the Campaign from its original objective, to support human health and welfare charity providing direct services to per-

sons in need, into a vehicle for the support of a vast array of organizations devoted to fundamentally different objectives, threatens the success of the Campaign. *Amici's* concern is not that inclusion of additional groups in the Campaign will diminish the amount of funding they receive; rather *amici* are concerned that the Campaign as a whole will be harmed, thus shrinking the pool of resources available to provide direct assistance to persons in need. Because the anticipated damage has already occurred and the continuing threat is real and immediate, *amici* seek this Court's review.

REASONS FOR GRANTING THE PETITION

The decision of the court below has significant and far-reaching implications. Foremost, the court below improperly applied the "public forum doctrine." It ignored the rational basis standard which this Court has declared must be satisfied to justify a restriction of access to a nonpublic forum and instead constructed a much more stringent, though largely unarticulated standard that rarely, if ever, could be satisfied. The stringency of this new measure for judging activities which take place in nonpublic forums ensures that the courts, and not our elected officials, will in the future determine the contours of these activities and their participants. No such intrusive judicial role was intended by the rulings of this Court, with which the D.C. Circuit decision is irreconcilable. Flouting of the principles carefully formulated by this Court in this sensitive area of constitutional law cannot be tolerated. For this reason alone, further review here is needed.

Furthermore, if allowed to stand the decision below will impede *amici* and other similar charitable organizations in attaining their goals of providing direct health and welfare services to persons in need. At best, diminishment of *amici's* ability to meet their program aims will impose an additional burden on the government to step in where *amici* will now fall short; at worst, curtailment of *amici's* efforts will cause those in need of their services to go without critical assistance. So long as the Campaign is prevented from returning to its original role, *amici,* their program beneficiaries, and ultimately society as a whole, will suffer.

1. This case presents issues of substantial public importance. The decision below represents a radical departure from the rules and principles this Court has established for determination of "public forum" questions. The D.C. Circuit's ruling is predicated on the assertion that the standard of "reasonableness" applied in nonpublic forum cases (*see, e.g., Perry Education Ass'n v. Perry Local Educator's Ass'n,* 460 U.S. 37, 49 (1983)) is somehow different and more exacting than the "rational basis" test applied in equal protection analysis. In fact, the panel majority faulted the dissent for "inexplicably" applying a rational basis test. *See NAACP Legal Defense and Educational Fund, Inc. v. Devine,* 727 F.2d 1247, 1266 (D.C. Cir. 1984). Yet in *Perry,* this Court explicitly stated that exclusions from a nonpublic forum "need only rationally further a legitimate state purpose." 460 U.S. at 54. *See, also, Jones v. North Carolina Prisioners' Labor Union,* 433 U.S. 119, 136 (1977) ("appellants need only demonstrate a rational basis for the distinctions between organizational groups.") This, of course, is the classic articulation of the "rational basis" standard. *See Dandridge v. Williams,* 397 U.S. 471, 485 (1970). In creating a more intrusive standard of review for nonpublic forum cases, the court below ignored the principles set out by this Court and instead required the Executive Order at issue to satisfy

a wholly different and indefensible standard of its own devising. The court's error must be corrected, as was urged by four of its members.[2]

The need for review by this Court becomes even more apparent when the analysis applied by the D.C. Circuit is examined. Assuming without deciding that the Campaign was a nonpublic forum, 727 F.2d at 1257,[3] the panel majority nonetheless found Exec. Order 12,404 "patently unreasonable and capricious" and thus constitutionally offensive. 727 F.2d at 1248. In reaching this conclusion, the panel majority found that the "status" of the excluded organizations was not legally different from the status of other included organizations. 727 F.2d at 1258. Thus, for example, the panel majority concluded that there was no difference in "status" between the NAACP Legal Defense and Educational Fund and the United States Olympic Committee, a "sports association[ ]" or "recreational societ[y]." 727 F.2d at 1259-60.

[2]The government's Suggestion for Rehearing *En Banc* was denied by an equally divided vote. *See* Petition for Certiorari at 80a.

[3]The District Court, 567 F.Supp. 401, 407 (D.D.C. 1983), and Circuit Judge Wright, 727 F.2d at 1268, concluded that the Campaign constituted a limited public forum. Even in a limited public forum, however, heightened scrutiny is mandated only as between "entities of similar character." *Perry* 460 U.S. at 48. Thus, even if the Campaign were construed to be a limited public forum, review in this case would hinge on whether reasonably, and factually, the excluded organization were "entities of similar character." For the reasons set out in Exec. Order 12,404, however, the excluded organizations are not such similar entities. At all events, *amici* agree with the government that the Campaign is at most a nonpublic forum. *See* Petition for Certiorari at 14-15 n. 14.

Whatever may be said about the accuracy of this observation,[4] it was inapposite to the resolution of the issue before the court. The issue before the D.C. Circuit was the facial validity of the Executive Order, *i.e.*, whether the Constitution requires that the President open the Campaign to organizations that do not have as their principal purpose service to the needy in the areas of human health and welfare. By failing to address this issue and instead focusing its inquiry on the application of the Order, even before the Order was implemented, the panel majority erred.

In contrast, the dissent recognized that to be constitutionally permissible, the restrictions imposed on participation in the Campaign needed only be "reasonable and neutral as to the viewpoint espoused by the 'speaker'." 727 F.2d 1268, 1274 (Starr, J. dissenting). The dissent accepted fully the legitimacy of the reasons proffered for the issuance of Exec. Order 12,404, *i.e.*, protection of the present and future success of the Campaign (thus lessening the government's responsibility to care for the needy), minimization of disruption in the federal workplace, and avoidance of the appearance of government favoritism toward certain legal and political advocacy groups. *Id.*, at 1276-77. As to the issue of "viewpoint neutrality," the dissent noted that Exec. Order 12,404 did not discriminate on the basis of political viewpoint, since the Order operated to exclude *all* groups which attempted "to influence the

[4]As the government notes in its petition, there is nothing in the record to demonstrate that the Olympic Committee would necessarily have qualified for inclusion under the regulations. *See* Petition for Certiorari at 17-18 n. 16. The panel majority erred in gauging the constitutionality of Exec. Order 12,404 on the comparison of entities which might or might not have properly been included in the Campaign.

outcome of elections or the determination of public policy through . . . litigation on behalf of others," regardless of political orientation. *Id.*, at 1281, *citing* Exec. Order 12,404 § 1(b), 48 Fed. Reg. 6685 (1983).

As this Court stated in *Perry*,

> on government property that has not been made a forum, . . . the [government] may draw distinctions which relate to the special purposes for which the property is used.

460 U.S. at 55. In this case the government has drawn such a distinction: the historical purpose of the Campaign was to support human health and welfare charity, and the government for reasonable, rational, and indeed compelling reasons, sought to restore it to that role. Because the court below impugned rather than deferred to the government's judgment on this sensitive matter, *North Carolina Prisoners' Union*, 433 U.S. at 128, and because in so doing it wholly transformed public forum analysis, review by this Court is warranted.

2. Beyond the doctrinal implications of the decision below, the practical consequences of that decision for the Campaign and for the government independently warrant this Court's consideration. The Campaign in its twenty-year history has developed into a multi-million dollar charitable fund raising effort. In fact, because of the number of federal employees, the Campaign accounts for a significant proportion of individual contributions made to charity nationwide.[5] Accordingly, anything which

[5]The Campaign is the single largest employee charitable fund-raising effort in the United States – in 1983, it raised almost 110 million dollars in contributions to various human health and welfare charities. *See* Office of Personnel Management Report, *CFC Results Report*, Table 1, at 1 (1983).

adversely affects the Campaign will have a detrimental impact on the many hundreds of participating humanitarian organizations and ultimately on the recipients of their services.

Specifically, the Campaign's success is due wholly to the good will of federal employees. For the last twenty years, federal employees have been voluntarily contributing to the Campaign, often designating no specific charity to receive their contributions, knowing that their gifts would go toward providing assistance to persons in need. The decision below, however, fundamentally alters the nature of the Campaign. No longer does the Campaign represent traditional human charity which federal employees have been willing to support generously. Instead, by virtue of the decision below, the Campaign now is open to virtually any "501(c)(3)" organization, *i.e.* any organization entitled to receive tax-deductible contributions under 26 U.S.C. § 501(c)(3), including legal advocacy and other special interest groups.

This is not to say that the purposes of these groups whose inclusion in the Campaign was mandated by the D.C. Circuit may not be laudable. But the impact of changing the Campaign from a mechanism for supporting traditional human health and welfare organizations whose purposes are approved by the vast majority of federal employees into one which supports virtually any "501(c)(3)" nonprofit organization, including those which may espouse controversial political and social causes, is to erode the good-will which the Campaign has generated among federal employees. The Campaign from its inception has had the unitary goal of directly supporting human health and welfare charity. As a result of the decision below, however, no longer is the Campaign a conduit for directly assisting those in need; rather it has now become a clearing

house servicing a hodgepodge of disparate organizations whose only common characteristic is their tax-exempt status.

That this change in the Campaign has tarnished it in the eyes of federal employees is borne out by several recent events. For example, inclusion of right-to-work groups in the Campaign resulted in boycotts by local unions, as well as a nationwide boycott by the International Association of Machinists and Aerospace Workers. *See* 727 F.2d at 1278.[6] Most ominously, while the total amount of contributions has increased nominally, the actual number of employees participating in the Campaign has decreased by one-third in recent years. *See Washington Post,* September 17, 1984, at A17, col. 3. The lifeblood of the Campaign is a supportive federal workforce; erosion of the Campaign's broad base of support threatens its very existence.

Furthermore, inclusion of all nonprofit groups in the Campaign has another adverse consequence. There are approximately 300,000 such organizations and even if only a portion of these participate in the Campaign the administrative costs of the program will significantly increase. Furthermore, as a practical matter, the Campaign would be inundated with organizations of divergent purposes and thus traditional health and welfare charities would be compelled to expend additional funds to convey their pur-

[6]The dissent below cites several other instances of boycotts and misgivings about the Campaign, *e.g.*, promises of future boycotts, attainment of contribution goals only after expenditure of extraordinary effort, "stumbling blocks" created by the inclusion of legal advocacy groups, etc. *See* 727 F.2d at 1277-79. *See, also,* 49 Fed. Reg. 32735 (1984) (summarizing comments voicing disapproval of the inclusion of political and legal advocacy groups in the Campaign.)

poses and message to potential contributors. Accordingly, less funding would be available to support human health and welfare charity, frustrating even further the historic purpose of the Campaign. Yet the ultimate frustration of the Campaign's purpose would be its court-ordered transformation from a support effort for human welfare into a collection agent for 300,000 tax-exempt organizations, most of which are unrelated in purpose and uncommitted to human welfare charity.

To the extent that the decision below has an adverse effect on the campaign, it consequently has an adverse impact on the government, and ultimately on society as a whole. One of the explicit purposes of Exec. Order 12,404 is to facilitate voluntary contributions to human health and welfare charities and thus "lessen the burdens of government and of local communities in meeting needs of human health and welfare." Because federal employees are continuing to lose confidence in the purposes and direction of the Campaign and because the Campaign accordingly will be hampered in its ability to deliver support for those in need, government at all levels will now be called upon to commit additional resources to meet these needs. At best, because of the decision below, the increased burden of meeting these needs will be shifted from contributions of federal employees to the taxpayers. At worst, the void left by the erosion of employee support for the Campaign will not be filled, and the burden will fall on those least able to bear it, the impoverished and disadvantaged. For this reason as well, review by this Court is warranted.

3. There can be no serious contention that the adverse consequences created by the decision below are in any way ameliorated or that the controversy here is mooted by the issuance of new regulations for the conduct of the 1985

Campaign. *See* 49 Fed. Reg. 32735 (1984). Foremost, the doctrinal aspects of the decision stand irrespective of the issuance of these new regulations. Thus, no matter what might happen to the Campaign, confusing and inconsistent precedent will have been set in this sensitive area of First Amendment law. With respect to the Campaign itself, however, the Office of Personnel Management ("OPM") was explicit, both in proposing the new regulations and in issuing the final regulations, in noting its intention to seek vindication of Exec. Order 12,404. *See* 49 Fed. Reg. 14572 (1984) (OPM "proposes to modify its regulations governing [the Campaign] in order to conform to court decisions that have, for the time being at least, invalidated on constitutional grounds key eligibility criteria"); 49 Fed. Reg. 32735 (1984) ("OPM has no choice but to establish revised rules governing the [Campaign] that conform to the controlling judicial pronouncements . . . OPM does so, of course, without prejudice to its right or duty further to modify the rules in the event of a supervening direction from a court . . ."). For these reasons, the questions presented by the decision below are viable, continuing questions which merit this Court's consideration.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1984

APPENDIX

THE UNITED BLACK FUND OF AMERICA

The United Black Fund of America was incorporated in 1977 to develop and monitor black-oriented fund-raising organizations through out the nation. It currently has 27 chapters and affiliates within 20 states across the nation which serve the human health and welfare needs of the various communities in which they are located.

AMERICAN CANCER SOCIETY
(District of Columbia Division,
Chesapeake-Potomac Area,
Montgomery County Unit,
Northern Virginia Area Office)

The American Cancer Society is a voluntary organization dedicated to controlling and eradicating cancer. It provides practical help, emotional support and community health services to persons afflicted with cancer and their families. The American Cancer Society also initiates and supports lifesaving programs of research, education, service and rehabilitation. The local chapters involved here all provide services in the Washington, D.C. metropolitan area.

AMERICAN RED CROSS
(District of Columbia Chapter)

The American Red Cross, incorporated in 1917, is an emergency-oriented organization which is chartered by Congress. The District of Columbia Chapter delivers services to the metropolitan Washington, D.C. community such as providing trained volunteers who assist families to cope with emergencies such as flood, home fires, near drownings and other disasters. In addition, the Red Cross

provides casework services to members of our armed forces, veterans and their families, and fosters opportunities for youth leadership development. It also trains volunteers to assist in hospitals and nursing homes, to teach parents to care for newborn babies, to train first-aiders in lifesaving techniques, and to transport the indigent and elderly to clinics, hospitals and help them obtain other assistance they require. In addition, the District of Columbia Chapter of the American Red Cross operates a volunteer blood program which supplies approximately 85% of all blood used in the National Capital area.

BOYS AND GIRLS HOMES OF MONTGOMERY COUNTY

Incorporated in 1964, the Boys and Girls Homes of Montgomery County provides residential, group and sheltered care to children ages 11-18 who are neglected, in need of supervision and assistance, or delinquents placed in its care by the Juvenile Court. This organization has established programs for basic child care, education, family therapy, counseling, special education and recreation. Also, the Boys and Girls Homes of Montgomery County provides medical referral services, and accepts self-referrals to its program for runaway youth.

BOY SCOUTS OF AMERICA
(National Capital Area Council)

Since 1927 the Boy Scouts of America has reached boys in the National Capital Area through organized "Cub Packs" for boys aged 8-10, "Troops" for those in ages 11-16, and a "Co-Ed Explorer Carrer Interest Program" for youth aged 14-18. The National Capital Area Council of the Boy Scouts of America operates Goshen Scout

Camp in Goshen, Virginia, and trains local leaders to direct community scouting programs. The Council has special programs devoted to providing character development for youth in the metropolitan Washington, D.C. area.

LUTHERAN SOCIAL SERVICES OF THE NATIONAL CAPITAL AREA

Established in 1927, Lutheran Social Services of the National Capital Area provides adoption programs, foster care, emergency, juvenile delinquency and life-enrichment services, pastoral care, refugee resettlement and volunteer services for criminal offenders and ex-offenders. This group offers housing rehabilitation and counseling programs, a ministry to the aging and the homeless, and pretrial sponsorship of persons accused of crimes.

THE SALVATION ARMY
(National Capital Area)

Incorporated in 1899, the Salvation Army provides emergency shelter, financial assistance and supplementary aid, food and clothing, as well as counseling, referral services, and Christmas food and toys to needy persons in the National Capital area. Its Corps Community Centers provide family-life counseling, character-building and athletic programs for youth, senior citizen programs, day care facilities and camping. The organization also offers a center for alcoholic rehabilitation, and provides job counseling, prison ministries and disaster relief.

VISITING NURSES ASSOCIATION OF NORTHERN VIRGINIA

Since 1939, the Visiting Nurses Association of Northern Virginia has provided intermittent home health services, including skilled nursing and home health aide care to the residents of northern Virginia. It offers phsyical, occupational and speech therapy, and provides the services of pediatric nurse practitioners, medical social workers, enterostomial therapists and oncology nursing specialists. Visiting nurses also provide home I.V. therapy and home care for the terminally ill.

CENTER CITY COMMUNITY CORPORATION

The Center City Community Corporation assists low-income inner city residents by offering tutorial senior citizen and youth services. Incorporated in 1969, this organization provides computer literacy classes for all age groups, and operates a comprehensive housing counseling center aimed at assisting renters and homeowners in avoiding or overcoming housing problems.

THE UNITED BLACK FUND OF GREATER WASHINGTON, D.C.

The United Black Fund of Greater Washington, D.C. was created in 1969 to address the need for a balanced and unified fund-raising effort on behalf of community-based, non-profit organizations serving the social and economic needs of citizens in the greater Washington area. The Fund's member agencies, ranging from the Geriatric Day Care Center to the Howard University Sickle Cell Research Center, have as their primary purpose the meeting of community health and welfare needs.